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CONTRACTUAL INTERPRETATION IN INDIAN EVIDENCE ACT JURISDICTIONS: COMPATIBILITY WITH MODERN CONTEXTUAL APPROACH?

GOH-YIHAN*

A INTRODUCTION

While much of the Commonwealth marches on to the call of the modern contextual approach to contractual interpretation,¹ a number of jurisdictions have had to grapple with heeding that call, and catering to more than a century-old statute that may go against that call. Common to these jurisdictions is an Evidence Act derived from the Indian version drafted by Sir James Fitzjames Stephen in the 19th century.² These affected jurisdictions include the whole of India (save for Jammu and Kashmir), Pakistan, Bangladesh, Sri Lanka, Burma, as well as Malaysia, Singapore, Brunei, and parts of Africa and the West Indies.³ Relevant provisions of the Indian Evidence Act (and its derivatives⁴) have to be considered for their compatibility with the modern contextual approach,⁵ although this is either seldom or inadequately done.⁶ Rather, some of the affected jurisdictions have approached the potential incompatibility problem ‘pragmatically’. Rather than be left behind in a new commercial reality, such jurisdictions have, among other approaches, read aspects of the modern contextual approach into their version of the Indian Evidence Act. This allows for an adoption of the modern contextual approach within the framework of a decidedly fossilised legislative intent. The question that arises is whether such an approach, while commercially pragmatic, is theoretically and doctrinally sound.

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¹ As restated by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (House of Lords (HL)) 912–13.

² The Indian Evidence Bill was considered and passed on 12 March 1872 in India by the 13 members of the Viceroy’s Legislative Council: see J D Heydon, ‘The Origins of the Indian Evidence Act’ (2010) 10 (1) Oxford University Commonwealth Law Journal, 1–2.

³ Heydon (n 2) 13.

⁴ Collectively known as the ‘Indian Evidence Act’ henceforth, unless the context indicates otherwise.

⁵ Whichever version is assumed to apply.

⁶ For an exception, see V K Rajah, ‘Redrawing the Boundaries of Contractual Interpretation: From Text to Context to Pre-text and Beyond’ (2010) 22 Singapore Academy of Law Journal 513.

The broad purpose of this article is to study some of the affected jurisdictions from a comparative perspective with three specific aims in mind. Firstly, relevant legislative provisions from the Indian Evidence Act will be examined to set the background for assessment. Secondly, this article will examine three responses from the affected jurisdictions to the incompatibilities: faithful adherence to the relevant legislative provisions; complete adoption of the modern contextual approach; and integration of the modern contextual approach into the relevant legislative provisions. Thirdly, this article argues that the challenge for the affected jurisdictions is to ascertain that correct balance between modern developments and fidelity to history, determined in part by the interaction between the common aims of contractual and statutory interpretation. This article suggests that while some jurisdictions affected by the Indian Evidence Act have correctly accepted the applicability of the modern contextual approach, they may not have adequately considered the extent to which that approach is compatible with the provisions of the Indian Evidence Act. It will be argued that the modern contextual approach is largely compatible with the Act, and that proper justification for the approach can and should be made with reference to the Act.

B THE MODERN CONTEXTUAL APPROACH IN THE INDIAN EVIDENCE ACT

1 Three Relevant but Distinct Questions

Before examining the compatibility of the modern contextual approach with the provisions of the Indian Evidence Act, it is necessary to first identify three relevant but distinct questions. The first question concerns the facts that may be proved. This is answered by Part I of the Indian Evidence Act. The primary rule is section 5 of the Act, which provides that evidence may be given of the existence or non-existence of every fact in issue or of any relevant fact, as defined by the Act. The second question concerns the mode of evidence that may be adduced to prove these facts. Part II of the Indian Evidence Act answers this question. Thus, even if a fact is declared to be relevant by Part I, certain types of evidence may not be adduced to prove such a fact if Part II excludes the adduction of such evidence. In the context of contractual interpretation, the second question assumes some significance because certain sections of the Indian Evidence Act, specifically those in Chapter VI, provide that certain facts to do with the existence of a contract, for example, may only be proved by *documentary* evidence and not oral evidence.

The third question concerns the substantive rules that are applied in the interpretation of contracts. As will be seen, the Indian Evidence Act does not contain any rule that deals with the interpretation of contracts; the modern contextual approach finds no direct expression in the Act. Thus, the compatibility

of the modern contextual approach with the Indian Evidence Act arises indirectly: assuming that the non-provision of the modern contextual approach does not preclude its application, the question then is whether the provisions in the Act concerning the facts that may be proved, and the evidence that may be adduced to prove those provable facts, so hamper the application of the modern contextual approach that it is rendered a dead letter.

2 Relevant Facts and the Parol Evidence Rule

As already mentioned, it is the first two questions that find expression in the Indian Evidence Act. The first question affects contractual interpretation by stipulating the relevant (and hence provable) facts. According to Stephen, facts may be related to rights and liabilities either by (a) constituting such a state of things that the existence of the disputed right or liability would be a legal inference from the fact (such facts are known as ‘facts in issue’), or (b) affecting the probability of the existence of facts in issue (known as ‘relevant facts’).⁷ Only facts that come within these two definitions may be proved. This affects the facts that may be proved when a contract is being interpreted. Its effect on the modern contextual approach is indirect: if the ambit of provable facts is narrow, then the underlying premise of the contextual approach—which is that almost all background information should be considered—would be undermined. And if this is undermined too severely, then the modern contextual approach may not even be applicable even though the Indian Evidence Act does not expressly exclude it. We will consider the reach of the relevant provisions in the discussion below.

The second question assumes importance by preserving various aspects⁸ of the parol evidence rule. This concerns the evidence that may be adduced to prove facts that are relevant by virtue of Part II of the Indian Evidence Act, with aspects of the common law parol evidence rule finding expression in Chapter VI of the Act. At common law, the parol evidence rule is a manifestation of the objective theory of contract.⁹ One aspect of the rule holds that parties who have reduced a contract to writing should be bound by it alone. Over time, this aspect of the parol evidence rule has become much narrower: only extrinsic evidence which ‘add to, vary or contradict’ the written contract are excluded and all other evidence can be adduced to prove the terms of the contract. Indeed, even more exceptions have been formulated to this aspect of the rule and it is usually regarded as a relic of

⁷ James Fitzjames Stephen, *An Introduction to the Indian Evidence Act: The Principles of Judicial Evidence* (2nd impression, Thacker, Spink & Co 1904) 12–13.

⁸ The Law Commission identified three distinct rules excluding extrinsic evidence, which collectively form the ‘parol evidence rule’: see Law Commission, *Law of Contract: The Parol Evidence Rule* (Law Com No 154, 1986) [1.2].

⁹ See generally Law Commission (n 7); D W McLauchlan, *The Parol Evidence Rule* (Professional Publications Ltd 1976).

the past.¹⁰ In so far as contractual interpretation is concerned, another distinct¹¹ aspect of the parol evidence rule prohibits the admission of extrinsic evidence for this purpose unless there is a latent ambiguity to be cured. Where there is merely patent ambiguity, extrinsic evidence cannot be used to interpret the contract. This aspect of the parol evidence rule is today also regarded as largely defunct at common law.¹² In particular, the modern contextual approach towards contractual interpretation allows the admission of almost all relevant evidence¹³—except for the well-known prohibitions against prior negotiations and subsequent conduct¹⁴—regardless of the nature of the ambiguity present. Notwithstanding this status of the parol evidence rule at common law, it still remains very much relevant to those jurisdictions governed by the Indian Evidence Act.

The Indian Evidence Act preserves the parol evidence rule by way of ten provisions.¹⁵ These provisions mirror three distinct rules of the common law parol evidence rule.¹⁶ The first rule is that the contents of certain documents—where made provable under Part I of the Act—must be proved by production of the document, except where secondary evidence is permitted.¹⁷ The second rule is that extrinsic evidence is not admissible to ‘contradict, vary, add to or subtract from’ the terms of a written document, subject to certain provisos.¹⁸ Finally, the third rule is that evidence of specific facts may be admitted in aid of the interpretation or construction of certain documents.¹⁹ The third rule is the most relevant to contractual interpretation, but does not itself provide a substantive rule of contractual interpretation.

The starting point is to consider section 91, the ‘proof by documentary evidence’ provision, which provides that:

When the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases

¹⁰ See eg Law Commission (n 7) and G McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification* (2nd edn, OUP 2011) 411.

¹¹ Robert Stevens, ‘Objectivity, Mistake and the Parol Evidence Rule’ in Andrew Burrows and Edwin Peel (eds), *Contract Terms* (OUP 2007) 108, 109. The difference between ‘interpretation’ and ‘adding to, varying or contradicting’ a contract was explained in Arthur Linton Corbin, ‘The Interpretation of Words and the Parol Evidence Rule’ (1965) 50 *Cornell Law Quarterly* 161, 171.

¹² See eg McMeel (n 10) 166–68.

¹³ *Investors Compensation* (n 1) 912–13.

¹⁴ *Investors Compensation* (n 1) 913.

¹⁵ As the numberings of these provisions differ according to the jurisdiction concerned, they will be referred to in this paper by reference to their purpose. Where a provision is reproduced, it will be from the Indian Evidence Act rather than any of its derivative versions operative in other jurisdictions.

¹⁶ Singapore Academy of Law, *Report of the Law Reform Committee on the Review of the Parol Evidence Rule* (2006) [13].

¹⁷ Singapore Academy of Law (n 16) [13]. According to Stephen, primary documentary evidence is the document itself and secondary documentary evidence includes a copy of the document or an oral account of its contents: see James Fitzjames Stephen, *A Digest of the Law of Evidence* (1st edn, MacMillan and Co 1876) 67–68.

¹⁸ Singapore Academy of Law (n 16) [13].

¹⁹ Singapore Academy of Law (n 16) [13].

in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.

This provision relates to the exclusiveness of documentary evidence and is an aspect of the ‘best evidence’ rule.²⁰ Relatedly, it provides that where a contract has been reduced to a document, that document must be produced as proof, being the best evidence of the agreement reached between the parties. Oral evidence is admissible to prove the agreement only by way of exception, and the relevant exceptions are provided by section 92, the ‘exclusion of oral evidence’ provision. It provides that:

When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to [the ‘proof by documentary evidence’ provision], no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms [subject to provisos 1 to 6] . . .

Section 92 operates in conjunction with section 91. Section 92 operates only where the contract (among other documents) has been proved under section 91. It is therefore based on the same principle that documentary evidence is superior to oral evidence and no oral evidence is generally admissible to contradict, add to or subtract from the terms of the contract proved by way of documentary evidence.²¹ Section 91 is said to deal with the exclusiveness of documentary evidence whereas section 92 deals with the conclusiveness and inclusiveness of documentary evidence. It supplements section 91 by excluding extrinsic evidence that may be used to control its terms.²² Section 92 is, however, subject to six provisos, which largely replicate the exceptions to the parol evidence rule at common law. Under these provisos, parol evidence is admissible exceptionally to prove (1) any vitiating factor such as fraud or illegality; (2) a separate oral agreement that is not inconsistent with the terms of the written contract; (3) a separate oral agreement constituting a condition precedent to the written contract; (4) a distinct subsequent oral agreement to rescind or modify the written contract;²³ (5) any usage or custom not expressly mentioned in the written contract (and not being inconsistent with its terms) but which are usually annexed to such

²⁰ Singapore Academy of Law (n 16) [31].

²¹ Singapore Academy of Law (n 16) [39]. See also M Monir, *Principles and Digest of the Law of Evidence* (Vol 1, 7th edn, The University Book Agency 1989) 969.

²² Sudipto Sarkar and V R Manohar, *Sarkar’s Law of Evidence* (16th edn, LexisNexis Butterworths 2007) 1461.

²³ Except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

contracts; and (6) any fact which shows the manner the language of a document is related to existing facts.

While provisos 1 to 5 largely replicate existing common law exceptions to the parol evidence rule, proviso 6 is slightly different. Although it appears as an exception to section 92, it is usually regarded as constituting a substantive rule concerning the proof of facts as aids to the interpretation of the contract.²⁴ Support for such a view can be found in one of Stephen's works on evidence published after the passage of the Indian Evidence Act. In Stephen's *Digest*, Stephen viewed sections 91 and 92 collectively, under what he termed as 'Article 90'.²⁵ However, Article 90, while including provisos 1 to 5,²⁶ did not contain proviso 6. Instead, proviso 6 was conceived as a sub-point under a separate 'Article 91', which dealt with 'what evidence may be given for the interpretation of documents'.²⁷ Stephen further noted that Articles 90 and 91 dealt with different matters: Article 91 dealt with the interpretation of documents by oral evidence whereas Article 90 defines the cases in which documents are exclusive evidence.²⁸ Although arranged slightly differently in the Indian Evidence Act, the accepted view in relevant jurisdictions is that proviso 6 to section 92 is a substantive rule of its own.²⁹

Thus, proviso 6 is more related to the next five provisions of the Indian Evidence Act, which together deal with the evidence that may be adduced to explain the terms proved under sections 91 and 92. These provisions correspond to sub-points of Stephen's 'Article 91' and start with section 93, the 'patent ambiguity' provision, which deals with the exclusion of evidence to explain or amend a document that is patently ambiguous. Section 93 provides that: 'When the language used in a document is on its face ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.' Therefore, in the instances where patent ambiguity arises—either by the language used being obviously uncertain (though intelligible), or so defective as to be meaningless—no evidence may be given to cure the ambiguity. This provision is based on the old cases of *Clayton v Lord Nugent*³⁰ and *Baylis v The Attorney General*,³¹

²⁴ See, eg, Sarkar and Manohar (n 22) 1538; V Kesava Rao, *Sir John Woodroffe & Syed Amir Ali's Law of Evidence* (18th edn, LexisNexis Butterworths 2009) 3711–12; Ratanlal Ranchhoddas and Dhirajlal Keshavlal Thakore, *Ratanlal and Dhirajlal's The Law of Evidence* (23rd edn, LexisNexis Butterworths 2010) 1148–49.

²⁵ Stephen (n 17) 88–89.

²⁶ See Stephen (n 17) 88–89.

²⁷ See Stephen (n 17) 91–92.

²⁸ See Stephen (n 17) 158. Indeed, the Law Commission of India, in their 69th and 185th Reports, which discussed various aspects of the Indian Evidence Act, discussed 'the first five provisos' and 'the sixth proviso [*ie*, proviso 6]' differently: see eg Law Commission of India, *Review of the Indian Evidence Act, 1872* (185th Report, 2003) 441.

²⁹ *Eg Belapur Co v State Farming Corpn* AIR (1969) Bom 231 (Bombay High Court (Bom HC)) [24]–[25]. It is also important to note that Stephen himself noted that Article 91 differed from the six similar propositions in James Wigram, *Admission of Extrinsic Evidence in Aid of the Interpretation of Wills* (2nd edn, Charles Hunter 1835) only in its arrangement and form of expression: see Stephen (n 17) 160–61.

³⁰ (1844) 13 K & W 200, 153 ER 83.

³¹ (1741) 2 Atk 239, 26 ER 548.

which each correspond to the illustrations accompanying the provision.³² In *Clayton*, a card which supplied meaning to initials appearing in a will was ruled inadmissible, whereas in *Baylis*, evidence as to the testator's intention to fill in a blank was similarly held inadmissible.³³ This has been explained on the basis that, in an instance of patent ambiguity, the intention of the maker of the contract becomes a matter of speculation and so the contract fails.³⁴

Closely related to section 93 is section 94, the 'plain language' provision. It provides that: 'When language used in a document is plain in itself and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.' This provision is the counterpart to section 93. Rather than be concerned with outward ambiguity, it is concerned with outward clarity, which arises because of the 'plainness' of the language when *applied* to existing facts. In such cases, no evidence may be admitted to explain that the contractual language was not meant to apply to such facts. Significantly, this provision is not only concerned with language that is 'plain in itself'; importantly, the plain language must also *apply* 'accurately to existing facts'.³⁵ The additional requirement that the plain language *apply* accurately to existing facts raises the question, which we revisit below, of whether the Indian Evidence Act contains a plain meaning rule, that is, words are presumed to have certain fixed meanings. This may be regarded as another way of characterising a situation 'where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument . . .'.³⁶ As Denman LCJ said in *Rickman v Carstairs*, '[t]he question . . . is not what was the intention of the parties, but what is the meaning of the words they have used'.³⁷

The next three provisions concern latent ambiguity and provide instances where such ambiguity may be present. Latent ambiguity is one which 'arise[s] extrinsically in the application of an instrument of clear and definite intrinsic meaning to doubtful subject-matter'.³⁸ Since such ambiguities arise from an extrinsic fact, extrinsic evidence is admissible to explain away the ambiguity.³⁹ The first provision, section 95, refers to the situation where otherwise plain contractual language is rendered meaningless in reference to existing facts.⁴⁰ This

³² The second more than the first; however see Stephen (n 17) 92, 94, in which Stephen identifies these two cases as illustrating the equivalent of the 'patent ambiguity' provision.

³³ Cf *Price v Page* (1799) 4 Ves Jun 679, 31 ER 351; *Harthy v Wall* (1817) 1 B & Ald 103, 106 ER 39.

³⁴ Sarkar and Manohar (n 22) 1552.

³⁵ Daniel Seng, 'Another Clog on the Construction of Contracts? Parol Evidence Rule and Use of Extrinsic Evidence' [1997] Singapore Journal of Legal Studies 457, 488.

³⁶ See *Shore v Wilson* (1842) 9 Cl & F 355, 565; 8 ER 450, 532. See also Seng (n 35) 488.

³⁷ (1833) 5 B & Ad 651, 663; 110 ER 931, 935.

³⁸ Thomas Starkie, *A Practical Treatise of the Law of Evidence, and Digest of Proofs in Civil and Criminal Proceedings* (Vol 3, 3rd edn, Stevens & Norton 1842) 755, 768.

³⁹ See eg *Doe d Oxenden v Chichester* (1816) 4 Dow 65, 93; 3 ER 1091, 1100.

⁴⁰ Cf *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 (Singapore Court of Appeal (Sing CA)) [79], in which the Court stated that this provision did not pertain to latent ambiguity since, after the context is considered, multiple meanings of the words in

provision finds expression in the common law of the time as well. For example, in *Allgood v Blake*,⁴¹ Blackburn J said that ‘[t]he general rule is to give the words their natural meaning unless, when applied to the subject matter . . . they produce . . . an absurdity.’⁴² The second provision, section 96, relates to an ‘equivocation’, or where the contractual language used might have been meant to apply to only one of several things that are each susceptible to the same description used. This is based on *Doe v Needs*,⁴³ in which evidence of the testator’s statements of intention and circumstances were admissible to ascertain which of two ‘George Gords’ he meant.⁴⁴ Finally, the third provision, section 97, concerns the situation where the contractual language could apply partially to two sets of existing facts but the whole does not apply correctly to either. This third instance is sometimes regarded as a specific application of the first instance.⁴⁵ It is based on several cases,⁴⁶ all of which illustrate that evidence of surrounding circumstances may be admitted to show which of two sets of existing facts the contract was meant to refer to.⁴⁷ In all such instances, evidence may be admitted to explain away the latent ambiguity. The latent ambiguity that arises is also shown by recourse to extrinsic evidence in the first place. For example, in the case of equivocations, it is presupposed ‘that the resources of construction, aided by all admissible extrinsic facts, have been first exhausted’.⁴⁸ It is after this threshold has been passed that extrinsic evidence showing the person or thing that the language was intended to apply to is admitted.⁴⁹

The final three provisions relevant to the evidence that may be adduced to explain the contractual terms, *viz*, sections 98 to 100, relate mainly to technical matters. There is section 98, the ‘evidence as to meaning of illegible characters’ provision, which allows the admission of evidence from experts and such persons to explain illegible writing. Then there is section 99, the provision that governs who may give evidence of an agreement varying terms of the written document. And finally there is section 100, the provision that provides that the previous provisions do not apply to the construction of wills. This article will not focus on these provisions of rather technical significance.

question do not exist; rather, the original language becomes meaningless in the light of the surrounding circumstances to convince the court that such language could not be used in its ‘plain’ sense.

⁴¹ (1873) LR 8 Ex 160.

⁴² *ibid* 163.

⁴³ (1836) 2 M & W 129, 150 ER 698.

⁴⁴ Stephen (n 17) 93, 95.

⁴⁵ Singapore Academy of Law (n 17) [58].

⁴⁶ *Doe v Hiscocks* (1839) 5 M & W 363, 151 ER 154; *Ryall v Hannam* (1847) 10 Beav 536, 50 ER 688; *Stringer v Gardiner* (1859) 27 Beav 35, 54 ER 14.

⁴⁷ Stephen (n 17) 93–95.

⁴⁸ James Thayer, *A Preliminary Treatise on Evidence at the Common Law* (first published 1898, Rothman Reprints 1969) 455.

⁴⁹ Seng (n 35) 493.

As can be seen, the Indian Evidence Act adopts an approach that fossilises, to a certain degree, various aspects of the parol evidence rule as it appeared in the 19th century. It largely concerns two broad aspects of the parol evidence rule relevant to contracts: first, when evidence can be adduced to prove the terms of the contract (which are already rendered provable via Part I of the Indian Evidence Act), and second, when evidence can be adduced to explain the terms of the contract so discerned. As regards the second aspect, the Indian Evidence Act contains a series of provisions that sets out a detailed regime for the admissibility of evidence. The question that arises then is whether these provisions, together with their embedded ideas, are compatible with the modern contextual approach to contractual interpretation.

C THREE MODELS OF RESOLUTION

The modern contextual approach is typically traceable to Lord Hoffmann's speech in *Investors Compensation*, where he summarised the modern contextual approach in five points. It is unnecessary to reproduce all of the well-known passage here, but it is possible to use it to discern several elements of the modern contextual approach. The key point made by Lord Hoffmann is that '[i]nterpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.'⁵⁰ This is the essence of the modern contextual approach and posits that interpretation, properly understood, must not take place in a vacuum but, rather, in consideration of all the relevant background information. This approach shifted the substantive rules governing the interpretative process from focusing on the meaning of the *words* used in the document to focusing on what would be understood as the meaning of the person *using* those words. Notwithstanding—as will be seen—some distinctions between the Indian Evidence Act and the modern contextual approach, the jurisdictions governed by the Indian Evidence Act have shown various responses to the rise of the modern contextual approach. These approaches may be divided into three broad categories.

1 Following the Status Quo: Adherence to the Indian Evidence Act

The first is to follow the status quo and adhere to the Indian Evidence Act more or less strictly. This is largely the approach taken in India, even if it has been said that not all the authorities speak with the same voice.⁵¹ The Indian approach is to treat proviso 6 of section 92 (the 'exclusion of oral evidence' provision) as a

⁵⁰ *Investors Compensation* (n 1) 912.

⁵¹ *Zürich Insurance* (n 40) [115].

substantive provision of its own governing the admissible evidence in aid of the interpretation of written documents such as contracts, its operation dictated by the next five provisions of the Indian Evidence Act.⁵² The collective effect of these provisions is well summarised by the Bombay High Court in *Ganpatrao Appaji v Bapu Thakaram*:

[W]here a document itself is a perfectly plain, straightforward document, no extrinsic evidence is required to show in what manner the language of the document is related to existing facts. There may be cases where such extrinsic evidence is required, and it will therefore be admitted. But it can only be in such cases where the terms of the documents themselves require explanation, evidence can be led within the restrictions laid down by the [proviso 6].⁵³

Under this approach, the modern contextual approach towards contractual interpretation is not denied and is in fact indirectly recognised.⁵⁴ It is only indirectly recognised because, as mentioned earlier, the Indian Evidence Act does not prescribe a substantive rule of contractual interpretation. What may be said at best is that the modern contextual approach is indirectly recognised because the ambit of admissible evidence in aid of interpretation is potentially large; this means that much of the context is potentially admissible, a lynchpin of the modern contextual approach. However, the extent of the recognition of the modern contextual approach is limited by the terms of the Indian Evidence Act. It follows that, if the language employed is ambiguous, the five provisions following the ‘exclusion of oral evidence’ provision would regulate the question of the admissibility of extrinsic evidence.⁵⁵ Specifically, proviso 6 admits extrinsic evidence only where there is latent ambiguity in the contract, of which there are

⁵² See eg Sarkar and Manohar (n 22) 1539.

⁵³ AIR (1920) Bom 143 (Bom HC) [12].

⁵⁴ See eg *Govindram Mihamal v Chetumal Villardas* AIR (1970) Bom 251 (Bom HC) [9]; H K Saharay, *Dutt on Contract: The Indian Contract Act 1872* (10th edn, Eastern Law House 2006) 4, 22–24; R G Padia, *Pollock & Mulla: Indian Contract and Specific Relief Acts* (13th edn, LexisNexis Butterworths 2007) 273–74.

⁵⁵ See eg *Rani Mewa v Hulas* (1874) LR 1 IA 157 (PC) [4]; *Bhairon v Janki* (1897) 19 All 133 (Allahabad High Court (All HC)) [4]; *Balkishen Dass v Legge* (1899) LR 27 IA 58 (PC) [10]; *Jafar v Ranjit* (1899) ILR 21 All 4 (All HC) [7]; *Ganpatrao Apaji* (n 53) [11]; *Martand v Amritrao* AIR (1925) Bom 501 (Bom HC) [6]; *Chunchun Jha v Ehadat Ali* AIR (1954) SC 345 (India Supreme Court (India SC)) [16]; *Belapur* (n 29) [24]–[25]; *Bhatt v VR Thakkar* AIR (1972) Bom 365 (Bom HC) [3]. Cf *Bajjnath v Vally Mahommed* AIR (1925) PC 75 (Privy Council (PC)) [22] ([‘The exclusion of oral evidence provision] merely prescribes a rule of evidence; it does not fetter the Court’s power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances.’); *Buddhu Shaw v Mongal Shaw* (1966) ILR 2 Cal 641 (Calcutta High Court (Cal HC)) [17], in which it was said: ‘The principle behind the rule, which the sixth proviso embodies, appears to be that in suitable cases, such as where the ‘haves’ prey upon the want and misery of the ‘have-nots’, it is the duty of the Court to get at the truth by entering into evidence with the subject of finding out in what manner the document’s language is related to the existing facts.’ This is unlikely to be correct; proviso 6 does not confer a power to the court to go behind otherwise unambiguous language where it would be ‘fair’ to do so owing to the unequal statuses of the contracting parties.

several instances recognised in the Act.⁵⁶ It has been said that legislature could not have intended to nullify the object of section 92 by enacting exceptions to that section.⁵⁷ The corollary is also true: where there is no dispute on the meaning of terms as applied to existing facts, no extrinsic evidence is admissible to interpret the contract.⁵⁸ Finally, where there is patent ambiguity, extrinsic evidence is inadmissible to interpret the contract in accordance with the ‘patent ambiguity’ provision.⁵⁹ Thus, as Lord Atkin observed in *Pakala Narayana Swami v R*, ‘when the meaning of words is plain it is not the duty of the courts to busy themselves with supposed intention’.⁶⁰ The presumption here is that the parties meant what they have written, *ie*, the plain meaning of the words. This limited (and indirect) recognition of the modern contextual approach, in line with the Indian Evidence Act, was summarised by the Andhra Pradesh High Court relatively recently in *Pradeep Kumar v Mahaveer Pershad* by way of five points, the most pertinent of which is this:

(5) in construing the document, the intention must be gathered from the document itself. However, if there is ambiguity in the language used in the document, it is permissible to look to surrounding circumstances to gather the intention, such as user or possession and enjoyment.⁶¹

2 Complete Adoption of Common Law Approach: Ignoring the Indian Evidence Act

The second approach is to ignore the terms of the Indian Evidence Act and adopt the modern contextual approach fully, without explaining why the latter is compatible with the former. To be fair, such an approach may not be substantively wrong; after all, the Indian Evidence Act does not prescribe or prohibit a specific

⁵⁶ *The Chairman, Serajgunj Municipality v Chittagong Co Ltd* (1922) 72 Ind Cas 969 (Cal HC) [5]; *Basanti v Official Receiver* AIR (1936) Lah 508 (Lahore High Court (Lah HC)) [3]; *Ram Narain v Manki* AIR (1954) Pat 562 (Patna High Court (Pat HC)) [15]–[16] (Cf *Zurich Insurance* (n 40) [116]–[118]); *Chandra Sekhar v Mural Gope* AIR (1957) Pat 673 (Pat HC) [3]; *Firm Bolumal v Venkatachelapathi Rao* AIR (1959) AP 612 (Andhra Pradesh High Court (Andh Prad HC)) [8]; *Darshan Dass v Ganga Bux* AIR (1962) Pat 53 (Pat HC) [6]; *Ramprashad Sahu v Basantia* AIR (1925) Pat 729 (Pat HC) [11]; *Baleshwar v Lal Bahadur* AIR (1972) Pat 87 (Pat HC) [10]; *Pradeep Kumar v Mahaveer Pershad* AIR (2003) AP 107 (Andh Prad HC) [18]. The academic texts are united in adopting this approach: see Sarkar and Manohar (n 22) 1538–39; Rao (n 24) 3451, 3712; Ranchhodas and Thakore (n 24) 1161.

⁵⁷ See Ranchhodas and Thakore (n 24) 1151–52.

⁵⁸ *Balkishen Dass* (n 55) [10]; *Udai Pratap v Jagat Mohan* AIR (1928) Pat 66 (Pat HC) [24]; *Firm Bolumal* (n 56) [8]; *Radha Sundar v Mohd Jahadur* AIR (1959) SC 24 (India SC) [6]; *Darshan Dass* (n 56) [6]; *Kamala Devi v Takhatmal* AIR (1967) 1020 SC (India SC) [8]–[9]; *Palaniappan v Kuppanmal* (1974) 1161 SC (India SC) [14]. See also Sarkar and Manohar (n 22) 1549–50; Ranchhodas and Thakore (n 24) 1149, 1151, 1159.

⁵⁹ *Deoji v Pitambar* (1875) 11 All 275 (All HC) [1]; *Keshavlal Lallubhai Patel v Lalubhai Trikumlal Mills Ltd* AIR (1958) SC 512 (India SC) [11].

⁶⁰ AIR (1939) PC 47 (PC) [10] (Atkin LJ), albeit in the context of interpreting a statute; however, Lord Atkin did agree that this principle extended to all written instruments.

⁶¹ (n 56) [18].

interpretative approach. The objection is, however, with not substantiating the adoption of the modern contextual approach with the terms of the Act. A related objection is also with admitting all manner of extrinsic evidence in line with the modern contextual approach but without considering whether this is prohibited or restricted legislatively.

An example of such an approach can be seen in the Malaysian Federal Court decision of *Berjaya Times Square Sdn Bhd (formerly known as Berjaya Dita Sdn Bhd) v M-Concept Sdn Bhd*.⁶² In that case, Gopal Sri Ram FCJ held that an earlier statement by the same court in *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd*,⁶³ that a document is to be construed from its four corners, was incorrect.⁶⁴ Instead, he referred to *Investors Compensation*, among other English cases, and said that a court interpreting a contract is entitled to look at the factual matrix forming the background of the transaction. This includes ‘all material that was reasonably available to the parties’.⁶⁵ No mention was made of the Malaysian Evidence Act, which contains equivalent provisions as those discussed earlier. It appears therefore that the approach taken in *Berjaya Times Square* is to completely ignore the statutorily imposed limits and adopt the modern contextual approach. To be fair, there are also Malaysian cases that have followed the provisions of the Malaysian Evidence Act in dealing with the admissible extrinsic evidence for the purposes of contractual interpretation.⁶⁶ Nonetheless, *Berjaya Times Square* is significant because it emanates from the highest court in Malaysia and was decided relatively recently.

3 Integration of the Common Law Approach: Liberal Interpretation of Indian Evidence Act

The third approach in dealing with the Indian Evidence Act is to integrate the common law approach with the Act through a ‘liberal’ interpretation of the Act. A prominent and recent example of this approach is that of the Singapore Court of Appeal in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd*.⁶⁷ Justice Rajah, the author of the judgment, has written extra-judicially that a ‘purposive reading of the provisions [of the Singapore Evidence Act] with the benefit of the modern insights on interpretation does not compel . . . a conclusion [that such provisions demand the exclusion of extrinsic evidence]’.⁶⁸

⁶² [2010] 1 MLJ 597 (Malaysia Federal Court (Malaysia FC)).

⁶³ [1984] 2 MLJ 268 (Malaysia FC) 271.

⁶⁴ *Berjaya Times Square* (n 62) [43].

⁶⁵ *Berjaya Times Square* (n 62) [42].

⁶⁶ See eg the cases cited in Krishnan Arjunan and Abdul Majid bin Nabi Baksh, *Contract Law in Malaysia* (LexisNexis 2008) 189; Dato Seri Visu Sinnadurai, *Law of Contract* (4th edn, LexisNexis 2011) 251–59.

⁶⁷ *Zurich Insurance* (n 40). Though see now, *Sembcorp Marine Ltd v PPL Holdings PTE Ltd* [2013] SGSA 43, which, while maintaining the legitimacy of *Zurich Insurance*, seems to have cut back on the extent for contractual interpretation in Singapore.

⁶⁸ Rajah (n 6) 536.

This is a broadly accurate summary of the approach taken in *Zurich Insurance*, which prescribed a two-step framework for the interpretation of contracts in Singapore, bearing in mind relevant provisions of the Singapore Evidence Act.⁶⁹ This framework rests upon an acceptance of the modern contextual approach, achieved by a ‘permissive interpretation’ of proviso 6⁷⁰ of section 94, the Singapore equivalent of section 92 of the Indian Evidence Act (the ‘exclusion of oral evidence’ provision).⁷¹

The first step of the *Zurich Insurance* framework is to consider whether extrinsic evidence can be admitted. This thus relates to the first two questions raised at the start of this article. It was held in *Zurich Insurance* that no extrinsic evidence is admissible to contradict, vary, add to or subtract from the terms of a contract to which the parol evidence rule applies. However, extrinsic evidence is admissible to interpret the contract even if there is no ambiguity in the contract concerned.⁷² Consistent with the modern contextual approach, whether the extrinsic evidence is admissible depends on whether it is (a) relevant (*ie*, it would affect the way in which the language of the document would have been understood by a reasonable man); (b) reasonably available to all the contracting parties;⁷³ and (c) related to a clear and obvious context.⁷⁴ According to the Singapore Court of Appeal, the extent of the admissible evidence is very broad and is not confined to empirical facts. This involves, in appropriate cases, a consideration of the commercial purpose of the contract in question.⁷⁵ The Court also optimistically noted that the focus on the narrow task of ascertaining the parties’ objective intention ought to prevent the endless trawl through large amounts of allegedly useful background material, often in misguided attempts to persuade a court to favour a subjective intention.⁷⁶

The second step of the *Zurich Insurance* framework concerns the task of interpretation under the modern contextual approach. This is the third question raised at the beginning of this article. Consistent with this approach, the Singapore Court of Appeal in *Zurich Insurance* noted that neither ambiguity nor the existence of an alternative technical meaning is a prerequisite for the court’s consideration

⁶⁹ 1997 Rev Ed (c 97). This is modelled after the Indian Evidence Act.

⁷⁰ Proviso (f) in the Singapore Evidence Act.

⁷¹ *Zurich Insurance* (n 40) [114].

⁷² *Zurich Insurance* (n 40) [115].

⁷³ *Zurich Insurance* (n 40) [125].

⁷⁴ *Zurich Insurance* (n 40) [132] (Although at [129]: ‘In our view, the benefits of adopting, via proviso 6 to s 94, the contextual approach to contractual interpretation (*viz*, flexibility and accord with commercial common sense) will be maximised and its costs (*viz*, increased uncertainty and added litigation costs) minimised if, as a threshold requirement for the court’s adoption of a different interpretation from that suggested by the plain language of the contract, the context of the contract should be clear and obvious.’) For a more general acceptance of the three requirements, see the Singapore High Court (Sing HC) decisions of *Goh Guan Chong v AspenTech, Inc* [2009] 3 SLR(R) 590 (Sing HC) [57] [79]; and *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094 (Sing HC) [31].

⁷⁵ *Yamashita Tetsuo v See Hup Seng Ltd* [2009] 2 SLR(R) 265 (Sing CA) [64].

⁷⁶ *Zurich Insurance* (n 40) [127].

of extrinsic material.⁷⁷ Then if, in the light of this context, the plain language of the contract becomes ambiguous (ie, it takes on another plausible meaning) or absurd, the court will be entitled to give the contractual term in question an interpretation which is different from that demanded by its plain language.⁷⁸ It should be noted that the Court does not locate a substantive interpretative approach within the Indian Evidence Act. This second step of the framework, therefore, is arguably a transplant of the modern contextual approach. Thus, the approach in *Zurich Insurance* simultaneously recognises the notion that words have fixed or plain meanings while also acknowledging that such meanings can be departed from to some extent.⁷⁹ However, the fixed or plain meaning of words still constrain the interpreter; if the objectively determined meaning strains that meaning unacceptably, then the better approach might be rectification.⁸⁰ The existing canons of interpretation continue to be relevant as well, although they are only a guide and not exhaustive.⁸¹

4 Accounting for the Different Approaches: Correlation between Contractual and Statutory Interpretation

These three approaches outlined above represent varying degrees to which the modern contextual approach has found expression within provisions of the Indian Evidence Act. The different approaches may be accounted for by the different (if unstated) approaches the various jurisdictions take towards the interpretation of statutes, in this case, the Indian Evidence Act. Although statutory interpretation is not the focus of this article, some brief reference will be made to it for completeness. In this regard, it is important to recognise that the issue of contractual interpretation in these jurisdictions involves a prior question of statutory interpretation. The modern approach in statutory interpretation, generally speaking, is the ‘purposive’ approach. This approach aims to further every aspect of the legislative purpose;⁸² as Lord Steyn has said, ‘[o]ne can confidently assume that Parliament intends its legislation to be interpreted not in the way of a black-letter lawyer, but in a meaningful and purposeful way giving effect to the basic objectives of the legislation.’⁸³ In ascertaining the legislative purpose, modern courts can have recourse to parliamentary materials, but usually prior to the enactment of the statute, for the statute is taken to crystallise the legislative intention. This is similar, from a broad perspective, with contractual interpretation, where the aim is likewise to ascertain the maker’s intention.

⁷⁷ *Zurich Insurance* (n 40) [115–21].

⁷⁸ *Zurich Insurance* (n 40) [130].

⁷⁹ *Zurich Insurance* (n 40) [122].

⁸⁰ *Zurich Insurance* (n 40) [123].

⁸¹ *Zurich Insurance* (n 40) [131].

⁸² Francis Bennion, *Bennion on Statutory Interpretation* (5th edn, LexisNexis 2008) 943.

⁸³ *Attorney General’s Reference (No 5 of 2002)* [2004] UKHL 43, [31] (Steyn LJ).

One might argue against the analogy of contractual and statutory interpretation. For example, Justice Kirby points out that a distinction between contracts and statutes is that a statute has wider ambit, application and longer anticipated duration than a contract. This means that statutory words tend to take on a broader operation and hence a wider meaning. This in turn makes it inappropriate to restrict the meaning of the statutory text to the ‘intentions’ of the original drafters.⁸⁴ Indeed, the very wide application of a statute—usually to society as a whole—means that contemporary ideas of justice and fairness may inform the interpretation of the statutory text even if it means departing from the original intention of its drafters.⁸⁵ On the other hand, because the time frame of a contract is shorter and the focus narrower, it is presumably more appropriate to restrict the meaning of the contractual language to what the contracting parties originally intended.⁸⁶ Professor Movsesian alludes to a similar objection. He says that contracts bind only the parties who make it whereas statutes do not.⁸⁷ A statute establishes rules for parties other than those who enacted it. He says, therefore, that ‘[n]otice to third persons is thus of critical importance’.⁸⁸ In such circumstances, to give priority to the “shared intent of the parties poses the risk of substantial hardship’.⁸⁹

Again, this is an argument on the correct approach to take in interpreting contracts and statutes. That is the fundamental question. In the Commonwealth context, as with the American approach, if the proper approach is taken to be the contextual or purposive approach, then these objections fall away. If the *a priori* question is how one should interpret a document, then the consequences of such an approach have no relevance to the former question. In the case of statutory interpretation and third parties, one may answer Professor Movsesian in two ways. First, as he acknowledged but rejected, legislators might be analogised to the agents of people.⁹⁰ Thus, when enacting decisions, they are actually acting *for* and *in place of* the people. By this view, there are no third parties. However, it is perhaps right to concede that this is a somewhat unrealistic view to take of the legislative process.⁹¹ A more plausible objection is that the legislative process *is* designed to bind third parties, and the ‘shared intent’ of the legislators is important in this respect to determine *how* third parties are to be bound. This brings us back full-circle to the fundamental question: how are we to interpret contracts and

⁸⁴ The Hon Justice Michael Kirby, ‘Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts’ (2003) 24 Statute Law Review 95, 106.

⁸⁵ *ibid* 107.

⁸⁶ *ibid* 107.

⁸⁷ Mark L. Movsesian, ‘Are Statutes Really “Legislative Bargains”? The Failure of the Contract Analogy in Statutory Interpretation’ (1997–98) 76 North Carolina Law Review 1145, 1171–72.

⁸⁸ *ibid* 1172.

⁸⁹ *ibid* 1172.

⁹⁰ *ibid* 1175–1176.

⁹¹ Indeed, how many would say that they accede to everything that legislature enacts, a pre-requisite requirement of the view?

statutes? If the intentions of their makers are regarded as essential, then the consequences of their intentions are not relevant to the anterior question. Professor Movsesian's objections can be rejected simply because they wrongly assume a co-relation between consequence and purpose. Thus, while it has variously been pointed out that contractual interpretation and statutory interpretation are quite different,⁹² both are actually similar on a broader level. They both concern ascertaining the meaning of the document in an objective manner.⁹³ The interpretation of the Indian Evidence Act, and its consequential effect on contractual interpretation, illustrates the interaction between both types of interpretation.

Following this approach, an overly broad reading of the Indian Evidence Act to permit all aspects of the modern contextual approach to contractual interpretation may actually represent an unintentional departure from the purposive approach to statutory interpretation, particularly when the full extent of the modern approach was never considered by the legislature responsible for enacting the Indian Evidence Act.⁹⁴ This is important for, as Aharon Barak puts it,⁹⁵ there is a difference between interpretative and non-interpretative doctrines.⁹⁶ Barak states that the authority to alter a text is one which belongs to its author, *ie* Parliament, but *not* to judicial interpretation. The act of interpretation is the giving of a legal text a meaning that its language (explicitly or implicitly) can bear and does not involve the express rewriting of the language.⁹⁷ Interpretation ends at the point at which language ends.⁹⁸ The constitutional framework and the separation of powers restrict interpreters from stretching the meaning of statutory provisions.⁹⁹ While there is a legislative mandate to *interpret* the statutory provision in the light of the legislative purpose, section 9A(1) also enjoins the court to interpret the *written law* (or a provision thereof). This implies the boundaries of the statutory language. While language is open to varying degrees of interpretation,¹⁰⁰ this does not mean that it is infinitely malleable and can be

⁹² See eg Catherine Mitchell, 'Contract Interpretation: Pragmatism, Principle and the Prior Negotiations Rule' (2010) 26 Journal of Contract Law 134, 148.

⁹³ *Zurich Insurance* (n 40) [133].

⁹⁴ See also Bennion (n 82) 890 (emphasis added) ('An updating construction of an enactment may be defined as a construction which takes account of relevant changes which have occurred since the enactment was originally framed *but does not alter the meaning of its wording in ways which do not fall within the principles originally envisaged by that wording.*') Indeed, even though the learned author states that considerations of developments in technology can be used by the courts to modify the statutory language (a proposition not entirely universally accepted: see Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press 1998)), he does qualify this statement by saying that '[i]f however changed technology produces something which is altogether beyond the scope of the original enactment, the court will not treat it as covered.' (Bennion (n 82) 905).

Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press 2005).

⁹⁵ *ibid* 14–15.

⁹⁶ *ibid* 18.

⁹⁷ *ibid* 15.

⁹⁸ *ibid* 20.

⁹⁹ *ibid* 23–24.

given any meaning.¹⁰¹ Rather than interpreting the Indian Evidence Act purposively, a court in such a case would actually be impermissibly rewriting the legislation concerned (by ignoring it), while at the same time (ironically) advocating a contractual interpretative approach that is loyal to the makers' intention. The interaction between the legislative purpose behind the Indian Evidence Act at the time of its enactment and the modern contextual approach forms the main criterion for assessing the compatibility of the modern contextual approach with the Indian Evidence Act.

On this premise, the approach that ignores the Indian Evidence Act must be rejected at the outset. While there may be an arguable point as to the extent that the Act remains relevant, that does not extend to ignoring it completely. So long as it remains on the affected jurisdictions' statute books, it is still an embodiment of legislative intent and so must be applied. The question is the extent of such application, and that invites an assessment and comparison of the approach which follows the Act completely, and that which applies it only partially.

D THE COMPATIBILITY OF THE MODERN CONTEXTUAL APPROACH WITH THE INDIAN EVIDENCE ACT

1 Does the Indian Evidence Act Contemplate the Modern Contextual Approach?

The first broad aspect of assessment concerns the interpretative approach thought to apply under the Indian Evidence Act. While the Indian Evidence Act does not outwardly prescribe any substantive contractual interpretative approach,¹⁰² modern courts have read the modern contextual approach into it, particularly via proviso 6 of section 92, the 'exclusion of evidence' provision. That this is done is not by itself incorrect, but this ought not to be mistaken as being driven by the modern contextual approach. The interpretation of the Indian Evidence Act, a piece of legislation written more than a century before *Investors Compensation*, should not be affected by the latter case and developments thereafter. Thus, while a Law Reform Committee formed by the Singapore Academy of Law has stated that 'a broader and more permissive application of [proviso 6] is to be preferred' as '[i]t accords with the modern approach to construction of contracts',¹⁰³ it is submitted that this starts on the wrong premise. As already mentioned, the interpretation of contracts in jurisdictions governed by the Indian Evidence Act, including Singapore, starts with a prior interpretation of a statute. The ascertainment of the legislative intent should be the starting point, rather than

¹⁰¹ *ibid* 23–24.

¹⁰² Neither does the Indian Contract Act (No 9 of 1872) or its equivalents prescribe an interpretative approach.

¹⁰³ Singapore Academy of Law (n 16) [125].

whether a particular mode of contractual interpretation accords with a modern development. This is especially since the very purpose of a code is to preserve the legislative intent at a particular time subject, of course, to limited flexibility. The constitutional framework and the separation of powers restrict interpreters from stretching the meaning of statutory provisions.¹⁰⁴

A more appropriate starting point is thus to consider the prevailing interpretative approach at the time when the Indian Evidence Act was enacted. The Indian Evidence Act was, after all, intended to codify the English evidence law of the time.¹⁰⁵ In this regard, Lord Hoffmann's speech in *Investors Compensation* did not, perhaps, break any new ground but did re-establish old ones.¹⁰⁶ The courts have always maintained the legitimacy and importance of interpreting contracts in their proper contexts and have been doing so since the 19th century or even earlier. At that time, contractual interpretation was largely regarded as 'liberal'.¹⁰⁷ It was liberal in the sense that the search was for the parties' true intentions, ascertained by consideration of the surrounding facts and circumstances,¹⁰⁸ as opposed to adhering to the strict literal sense of contractual terms.¹⁰⁹ Thus, the Indian Evidence Act was probably not intended to supersede the contextual interpretative approach. Just as the contextual approach continued to be advocated by the courts of that time despite the restrictive rules governing the admissible background information, so too can the contextual approach exist simultaneously with the Indian Evidence Act. While it is true that the common law parole evidence rule and the Indian Evidence Act both restricted the background information available to the interpreting party, these restrictions did not render the contextual approach inapplicable since *some* context was still made available. What resulted was a weaker *implementation* of the contextual approach: one that denies the full range of background information normally available and adheres to certain default positions concerning the plain meaning of words as the criterion for admissibility. This demonstrates the interaction between the question of admissible evidence and the question of the substantive interpretation approach. However, the weaker implementation of the contextual approach did not militate

¹⁰⁴ Barak (n 95) 20. Also, '[p]urposive construction often requires a sophisticated analysis to determine the legislative purpose and a discriminating judgment as to where the boundary of construction ends and legislation begins.' (*Kingston v Képrose Pty Ltd* (1987) 11 NSWLR 404 (NSW CA) 423 (McHugh JA)). See also E W Thomas, 'The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium' (2000) 31 Victoria University of Wellington Law Review 5.

¹⁰⁵ See Stephen (n 17) 2. Cf *Balkishen Dass* (n 5) [10] ('The cases in the English Court of Chancery which were referred to by the learned judges in the High Court have not, in the opinion of their Lordships, any application to the law of India as laid down in the Acts of the Indian Legislature.').

¹⁰⁶ McMeel (n 10) 162.

¹⁰⁷ Samuel Comyn, *A Treatise of the Law Relative to Contracts and Agreements Not Under Seal* (A Strahan, 1807) 532.

¹⁰⁸ *Shore v Wilson* (n 36) 521, 534–536.

¹⁰⁹ H T Colebrooke, *Treatise on Obligations and Contracts* (Black, Kingsbury, Parbury, and Allen, Leadenhall-Street 1818) 65.

against the adoption of *some form* of contextual approach. Therefore, the acceptance of such an approach is not *prima facie* wrong.

The quite separate (and important) question now is the *extent* to which the contextual approach applies pursuant to the Indian Evidence Act. We start with the arguable companion to the Indian Evidence Act, *viz*, Stephen's *Digest*. In contrast with the Indian Evidence Act, Stephen's *Digest* contained substantive rules. For example, notwithstanding its stated purpose as concerning 'what evidence may be given for the interpretation of documents', Article 91 contains certain rules that govern how to interpret a document. Specifically, Article 91(1) provides that: '(1) Putting a construction upon a document means ascertaining the meaning of the signs or words made upon it, and their relation to facts.' Two points flow from the inclusion of substantive interpretation rules in the *Digest*, which were excluded from the Indian Evidence Act. The first is that the exclusion of an interpretative approach in the Act may be taken as a *deliberate* departure from the inclusion of such in the *Digest*. As such, at least a *prima facie* case may be made to the effect that the Indian Evidence Act does not preclude the modern contextual approach, elements of which found expression before the 20th century.

Second, Article 91(1) is significant as it subtly encapsulates an interpretative approach that is quite unlike the modern contextual approach. The key corollary of the modern contextual approach was that it focused on the meaning of the *words* used in the document. Article 91(1)—and indeed other sections of the Article—reflects this approach. Stephen makes repeated reference to the 'meaning of the signs or words' of a document. The Indian Evidence Act, in contrast, employs almost exclusively the different phrase 'the language used in a document' in the equivalent (or similar) provisions. 'Language used' may not preclude the modern contextual approach as it is an express departure from the meaning of the signs or words. Rather than be dictated by the inherent meanings of signs and words, 'language' at least suggests a departure from this stance, or even an adoption of a more context based approach.

However, it does not follow that because the Indian Evidence Act does not preclude the modern contextual approach that such an approach can be fully implemented. The question is how much of the context can be referred to. While this is a separate question from the interpretative approach to be taken, its relation to the approach is quite important. Indeed, at the most, we have seen thus far that the Indian Evidence Act allows recourse to the context via proviso 6 of section 92. To that extent, it *indirectly* supports a contextual approach. However, the application of a contextual approach merely connotes that the context should be looked at in the interpretation process; it does not tell us the extent to which the context may be looked at. Indeed, with *Investors Compensation*, the model of contextual approach may be regarded as having shifted away from the weak version preserved under the Indian Evidence Act. The stronger version posits that words are inherently open-textured and can take on a variety of different meanings depending on the context in which the contract concerned was made.

To cater for this open-textured nature of words, the extrinsic evidence admissible is purposely made very broad, subject to the exceptions against the admissibility of prior negotiations and subsequent conduct. This forms a possible difference between the modern contextual approach and the Indian Evidence Act, which we explore in the next section.

2 The Plain Meaning or Plain Application Rule?

It is precisely because of this potential difference that it would be wrong to suppose straightaway that the full extent of the modern contextual approach could be transplanted into the Indian Evidence Act. One reason against such transplantation may be that the Indian Evidence Act subscribes to the notion that words have certain fixed or plain meanings to them. This is the argument we consider now.

It is perhaps not wrong to say that the Indian Evidence Act contemplates that words have fixed or plain meanings to them. Consider for example section 94, which provides that: ‘When language used in a document is plain in itself and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.’ This clearly contemplates that language used in a document can be ‘plain’. However, this may not translate into a plain meaning rule, that is, words are to be given their plain meanings. Under this rule, evidence is not admissible to contradict the otherwise plain meaning of a contractual provision. This would have been consistent with the prevailing common law of the time. For example, Lord Halsbury in *North E Ry Co v Hastings*¹¹⁰ said that words of a written instrument must be construed according to their natural meaning and this principle is universally insisted upon.¹¹¹ Indeed Article 91(2) of Stephen’s *Digest* contains a plain meaning rule. It provides that: ‘[E]vidence may not be given to show that common words, the meaning of which is plain, and which do not appear from the context to have been used in a peculiar sense, were in fact so used.’

This is the classic formulation of the plain meaning provision. It is, however, absent from the Indian Evidence Act. Section 94, which is reproduced above, is its closest counterpart. However, it does not deal predominantly with the meaning of words at all, but only with their application. This suggests that the Indian Evidence Act did not intend to encapsulate a plain meaning rule. In a related vein, one further argument in support of this may be the express departure from the ‘meaning of signs or words’ formulation in the *Digest*. It may be argued that this departure, and the shift to emphasise on the ‘language’ used, means that the Indian Evidence Act does not subscribe to the notion that words have certain fixed or plain meanings that will *always* be insisted on. This militates against a plain meaning rule within the Indian Evidence Act.

¹¹⁰ (1900) AC 260, 263 (Halsbury LC).

¹¹¹ See also *Gibson v Minet* (1791) 1 H Bl 569, 616; 126 ER 326, 352; *Shore v Wilson* (n 36) 485–487; 436–443.

Moreover, in Wigram's work on the admissibility of extrinsic evidence in the interpretation of wills—which Stephen said he was heavily influenced by in formulating Article 91 of his *Digest*—the notion that the plain meaning of words is not absolute finds expression in his first three Propositions, all of which correspond to various provisions in the Indian Evidence Act.¹¹² By Proposition 1, a testator is always presumed to use the words in which he expresses himself, according to their strict and primary acceptance *unless otherwise contradicted from the context of the will*.¹¹³ By Proposition 2, the plain meaning of words should be applied *if such meaning is sensible with reference to extrinsic circumstances*.¹¹⁴ And finally, by Proposition 3, the plain meaning of words can be departed from *when such meaning is insensible with reference to extrinsic circumstances*.¹¹⁵ Proposition 2 is reflected in section 94 of the Indian Evidence Act, and Proposition 3 clearly influenced section 95. These Propositions likewise subscribed to the notion that words have plain or fixed meanings, but they also contemplated that such meanings can be departed from if the *application* of such words reveals otherwise.

It is also useful to compare the language of section 94 of the Indian Evidence Act with Article 91(6) of Stephen's *Digest*, its closest equivalent. This Article provides as follows: '(6) If the document has one distinct meaning in reference to surrounding circumstances, it must be construed accordingly, and evidence to show that the author intended to express some other meaning is not admissible.'

The phrase 'it must be construed accordingly' is missing in the Indian Evidence Act and this is surely an extremely significant omission. A comparison between the respective illustrations shows the impact of the change. The illustration to section 94 states that A has an estate at Rampur containing 100 bighas, and A indeed has such an estate. In such a case, evidence may not be given of the fact that the estate meant some other one at a different place and of a different size. In contrast, in *Miller v Travers*, of which the illustration to Article 91(6) is based, evidence was held inadmissible to render reference to the 'county of Limerick' as really being to the 'county of Clare'. However, it is significant that the illustration contemplates, as do the facts of *Miller v Travers*, that there are *no* estates in the country of Limerick. In other words, what the illustration was concerned about was the plain meaning of the words without care of its application. If the same facts were applied to the Indian Evidence Act, it is conceivable that sections 94 and 95 would operate in tandem to allow for the admission of extrinsic evidence to show that reference to the 'county of Limerick' was really to the 'county of Clare' since the application of the words 'county of Limerick' would be 'unmeaning in reference to existing facts'.

¹¹² Stephen (n 17) 160–161. It has been noted that the provisions in the Indian Evidence Act concerning the interpretation of contracts correspond to various propositions in Wigram's work: see Sarkar and Manohar (n 22) 1573.

¹¹³ Wigram (n 29) 13.

¹¹⁴ Wigram (n 29) 15.

¹¹⁵ Wigram (n 29) 29.

Therefore, the added qualification in the illustration that the estate did exist, read together with the added language in the substantive provision on existing facts, would seem to represent a significant toning down of the rule in *Miller v Travers*, which makes it much more compatible with the modern contextual approach. The result must be that the Indian Evidence Act does *not* enshrine the plain meaning rule as the *Digest* does. However, it does proceed on the basis that words have fixed meanings; the difference is that it, however, does not insist on such meanings unless it can be shown that the *application* of that meaning to existing facts would give rise to an inaccuracy or an ambiguity. The Indian Evidence Act can thus at the very best be said to contain a plain *application* rule in section 94.

Viewed this way, there may not be a material distinction between the Indian Evidence Act and the modern contextual approach. It is true that in *Investors Compensation*, Lord Hoffmann said that '[t]he meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words'.¹¹⁶ According to Lord Hoffmann, the meaning of words is the matter of dictionaries and grammar; this is a reference to the notion that words have fixed or plain meanings which do not change with the context, and which is not followed under the modern approach. Instead, the modern contextual approach takes it that words do not have such plain meanings and are susceptible to a variety of meanings, even to the extent that there is an outright departure from the fixed meaning of the word used. The rationale for this is that the courts 'do not easily accept that people have made linguistic mistakes, particularly in formal documents'.¹¹⁷ Indeed, an eminent commentator has described the modern approach as having abandoned the plain meaning rule in favour of an inference—which may be displaced by the context—that words are used in their natural, ordinary or common signification.¹¹⁸ The Indian Evidence Act, whilst presupposing that words have plain meanings, insist that the application be incorrect before allowing for correction. There is limited fidelity to the plain meaning of the words. If this description is correct, then there is no real difference between the Indian Evidence Act and the modern contextual approach. The notion that words have plain or fixed meanings is subscribed to by both approaches, but it is also acknowledged that it can be departed from where the context requires it.

3 Limited Admissibility of Extrinsic Evidence?

We have so far concluded that there is no plain meaning rule in the Indian Evidence Act. At the most, it has a plain application rule that, while paying

¹¹⁶ *Investors Compensation* (n 1) 913 (Lord Hoffmann).

¹¹⁷ *Investors Compensation* (n 1) 913 (Lord Hoffmann).

¹¹⁸ D W MacLauchlan, 'Contract Formation, Contract Interpretation and Subsequent Conduct' (2006) 25 Queensland Law Journal 77, 92.

fidelity to the plain meaning of words, allows for departure from such meaning where the context reveals an inaccuracy or ambiguity. However, we are still faced with some provisions of the Indian Evidence Act that seemingly restrict the admissible evidence to interpret contracts. In other words, we are still left with the question of whether various aspects of admissibility limit the application of the modern contextual approach.

(a) Facts That May be Proved

We start first with the fundamental question of which facts are relevant (and hence provable). Consider, as a starting point, the ‘state of things’ provision in section 7 and the ‘supporting inferences’ provision of section 9 of the Indian Evidence Act, which are set out below:

7 Facts which are the occasion, cause, or effect, immediate or otherwise, or relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

9 Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue, or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.

These appear to be *prima facie* wide enough to make the ‘factual matrix’—the focus of the modern contextual approach relevant—and hence provable under the Indian Evidence Act. In fact, illustration (a) to section 9, which provides that the state of A’s property and of his family at the date of alleged will may be relevant facts to ascertain whether a given document is the will of A. This seems at least analogous to the relevant background information in contractual interpretation. The only way in which this might not be so is if they were expressly excluded by virtue of some other provision. Obviously, this does not mean that everything and anything is admissible. The general provision of section 5—that evidence can only be given of facts in issue or relevant facts and of nothing else—continues to control. The result is that relevance continues to be important, but that one has to fall back upon the very general test of relevance set out in Part I in deciding what facts a party can be allowed to prove, and what facts a party cannot.

Some courts have gone a step further and read other requirements before facts may be proved into the Indian Evidence Act without referring to the relevancy provisions under Part I of the Indian Evidence Act. For example, the Singapore Court of Appeal in *Zurich Insurance* imposed the requirements of relevancy, reasonable availability and clear and obvious context before extrinsic evidence was admitted to interpret a contract. It seems that the Court was concerned with

the facts that may be proved, as opposed to the evidence that may be adduced to prove those facts.

If this is correct, it is submitted that the Indian Evidence Act does not *outwardly* support these requirements. First, it is not possible to *overtly* locate the basis of these requirements within the Indian Evidence Act. Turning to the requirement of relevancy, the usage of ‘relevancy’ in *Zurich Insurance* is apparently not the technical sense prescribed by Part I of the Indian Evidence Act. In particular, and as already mentioned, the Indian Evidence Act enacts that ‘[o]ne fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts’. Thirteen sections of the same Act lay down the situations in which facts are ‘relevant’, and no more.¹¹⁹

The second requirement of ‘reasonable availability’ is likewise not expressly provided for in the Indian Evidence Act and is derived from *Investors Compensation*. Although Lord Hoffmann in *Investors Compensation* phrased the ‘reasonable availability’ requirement as a distinct requirement,¹²⁰ its underlying rationale is still tied to that of the modern usage of ‘relevancy’. In *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*,¹²¹ Brennan J said that ‘an extrinsic fact known only to one of the contracting parties can shed no light upon the meaning with which that word or phrase was used by the other or others’.¹²² There is thus a presumption—a seemingly irrebuttable one—that extrinsic evidence which is not available to both contracting parties would not assist in the reasonable man’s understanding of the contractual term and, hence, not be ‘relevant’. The inquiry revolves around the fundamental question of whether the reasonable man would derive assistance or help from the extrinsic evidence concerned, and the requirement of ‘reasonable availability’ is simply a specific facet of this broader inquiry, which is not provided for in the Indian Evidence Act.

The third requirement of a ‘clear and obvious context’ may also be cast in the same light. On the basis of promoting certainty, the Singapore Court of Appeal in *Zurich Insurance* imposed a threshold requirement of a ‘clear and obvious context’ before extrinsic evidence can be admitted. The Singapore High Court has explained in a later case that this means that the extrinsic evidence that is tendered before the court must point to a clear or obvious context before the court can say with any certainty that such evidence is of assistance to the court. According to the Court, this makes logical sense because if the extrinsic evidence points to a context that is far from clear or obvious, the court would be acting within the realm of speculation.¹²³ On this reading, this requirement of a ‘clear

¹¹⁹ See *Lee Chez Kee v PP* [2008] 3 SLR(R) 447 (Sing CA) [69].

¹²⁰ *Investors Compensation* (n 1) 912–13.

¹²¹ (1982) 149 CLR 337.

¹²² *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 (Aust HC) 401 (Brennan J).

¹²³ *Tiger Airways Pty Ltd v Swissport Singapore Pte Ltd* [2009] 4 SLR(R) 992 (Sing HC) [22].

and obvious' context is simply an elaboration of the relevance test discussed earlier. Where extrinsic evidence is unclear, it will also be generally unhelpful to the reasonable man's understanding of the contractual terms, thereby failing the requirement of 'relevance'. Likewise, this is not provided for in the Indian Evidence Act.

Therefore, the three requirements of relevance, reasonable availability, and clear and obvious context are really three sides of the same question, premised on the concept of 'relevance' as explained in *Investors Compensation*. While possibly justifiable on pragmatic grounds, the better view is that these requirements can find an anchor in the relevancy provisions, either section 7 or 9, of the Indian Evidence Act. These sections are conceivably wide enough to accommodate these requirements.

(b) Need for Ambiguity Before Extrinsic Evidence Admissible?

It is clear therefore that various provisions of Part I of the Indian Evidence Act allow a wide context to be provable. Moreover, the reading of a plain application rule into the Indian Evidence Act means that the admissibility of extrinsic evidence is not dictated by a prior need for ambiguity, as insisted by the Indian cases. This is the position under the modern contextual approach.¹²⁴ Yet, the Indian cases are also correct in insisting on the need for ambiguity before extrinsic evidence can be admitted for the purpose of explaining the words concerned. The key is to recognise that extrinsic evidence may be admissible for several purposes, and the criterion of ambiguity applies to restrict admissibility for a specific purpose only.

On its face, the Indian Evidence Act provides for a limited admissibility of extrinsic evidence in the interpretative exercise based on the criterion of ambiguity. If this is in fact true, this would be in contrast to the modern contextual approach, which imposes fewer boundaries on the admissible evidence. As Lord Hoffmann said in *Investors Compensation*:

Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.¹²⁵

Although Lord Hoffmann qualified the ambit of this statement in a later case,¹²⁶ the fact remains that the modern contextual approach allows for a greater range of admissible evidence than the Indian Evidence Act when it comes to the interpretation of contracts. Some courts, such as the Singapore Court of Appeal,

¹²⁴ See, eg, *Investors Compensation* (n 1); *Westminster City Council v National Asylum Support Services* [2002] UKHL 38 (HL) [5].

¹²⁵ *Investors Compensation* (n 1) 912–13 (Lord Hoffmann).

¹²⁶ See *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8 [39] (Lord Hoffmann).

have dismissed the requirement of ambiguity before extrinsic evidence can be admitted. The question is whether this is permissible under the terms of the Indian Evidence Act.

The Indian Evidence Act specifically restricts the range of admissible evidence primarily by recourse to the distinction between latent and patent ambiguities. The distinction between these two types of ambiguities originated from Lord Bacon's Maxims.¹²⁷ Although those Maxims were originally formulated for pleadings, they have attained substantive effects of their own on the basis that 'a transaction of one "nature" cannot be overturned by anything of an inferior "nature"'.¹²⁸ While once also a restriction of the admissible evidence under the common law, that distinction has largely been done away with in the present time.¹²⁹ The result is that the ambiguities restrict the range of admissible evidence under the Indian Evidence Act,¹³⁰ although only for the specific purpose of explaining words. This is very clear on the face of the relevant provisions: for example, section 94 refers to extrinsic evidence being used to show that the words were 'not meant to apply to such [existing] facts'. Likewise, section 95, the first of the 'latent ambiguity' provisions, allows for extrinsic evidence to be 'given to show that it was used in a peculiar sense'. The common purpose contemplated is the use of extrinsic evidence to *explain* the words concerned. Nowhere in the Indian Evidence Act is there a prohibition against the admissibility of extrinsic evidence to establish whether there is an ambiguity in the first place. This is also consistent with the prevailing law—that extrinsic evidence is always admissible to raise a latent ambiguity—at the time the Indian Evidence Act was enacted.¹³¹

Therefore, it is necessary to be clear what the purpose for admitting extrinsic evidence is. The contractual interpretative exercise is a composite one, in which extrinsic evidence may be used for different purposes. More specifically, extrinsic evidence may be admitted to establish whether there is an ambiguity; a pre-interpretative exercise that establishes negatively what the word cannot mean, but does not yet establish positively the meaning of the word. This is a subtle but important distinction that is necessarily implied in the various provisions of the Indian Evidence Act that contemplate either patent or latent ambiguity. Indeed, without recourse to such evidence, it is not possible to ascertain whether there is

¹²⁷ Francis Bacon, *A Collection of Some Principal Rules and Maxims of the Common Lawes of England* (1630) 72.

¹²⁸ J H Wigmore, *Wigmore on Evidence: A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (Chadbourn Revision), vol 9 (3rd edn, Little Brown and Company, 1940) 88.

¹²⁹ Maybe even earlier: see eg *Colpoys v Colpoys* (1822) Jacob 451, 463; 37 ER 921, 925. See also *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 (HL) 268, '[T]he distinctions between patent ambiguities, latent ambiguities and equivocations as regards admissibility of extrinsic evidence are based on outmoded and highly technical and artificial rules and introduce absurd refinements.'

¹³⁰ See, eg, F M Morgan, 'Extrinsic Evidence in the Evidence of Wills' (1860) 2 Juridical Society Papers 351, 378, in which the author noted that Lord Bacon's maxim was not intended to be a complete dissertation upon the use of extrinsic evidence in the juridical interpretation of legal instruments, and it was a maxim relating to pleadings, not to evidence. See also Seng (n 35) 485.

¹³¹ See, eg, *Thomas v Thomas* (1796) 6 TR 671, 101 ER 764.

ambiguity in the first place. However, the type of ambiguity determined then restricts the use of extrinsic evidence to supply a different meaning than the plain meaning, if the application of the plain meaning results in an ambiguity. Thus, the Indian courts' lack of distinction between these specific uses of extrinsic evidence may require reconsideration. The truth is that when the Indian courts rule that there is ambiguity (or not), they have already implicitly considered extrinsic evidence, although not (yet) for the purpose of explaining the contractual words (in a positive sense). This distinction is, in contrast, acknowledged by the integrated approach of the Singapore Court of Appeal. The Singapore approach is to recognise that ambiguity plays no role in limiting the extrinsic evidence in establishing whether there is an ambiguity in the first place. However, ambiguity plays a role in restricting the use of extrinsic evidence in departing from the plain meaning (where the application of such plain meaning results in an ambiguity) of the words: in the absence of ambiguity after considering the extrinsic evidence, the evidence cannot be used to positively ascribe a meaning to the word that is different from its plain meaning. It is suggested that such an approach is compatible with the original legislative purpose behind the Indian Evidence Act, and is to be encouraged.

(c) Prior Negotiations and Subsequent Conduct?

A specific issue concerns the admissibility of prior negotiations and subsequent conduct under the Indian Evidence Act. The admissibility of evidence under the modern contextual approach is subject to two prominent exceptions: both prior negotiations and subsequent conduct cannot be admitted to interpret the contract. According to Lord Hoffmann in *Investors Compensation*, '[t]he law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life.'¹³² While the ambits of these exceptions have been reduced in recent times, they still block out a range of evidence that may be relevant in the interpretative exercise. The Indian Evidence Act, on the other hand, does not overtly prohibit recourse to such evidence. Instead, it potentially blocks out such evidence due to the distinction it draws between latent and patent ambiguities. Indeed, this was the position taken by the common law in the 19th century until certain cases at the turn of the 20th century, such as *Inglis v John Buttery Co*,¹³³ established the currency of an independent rule which excludes the recourse to prior negotiations and subsequent conduct—a rule that has remained to the present day despite its questionable historical lineage. On the express words of the Indian Evidence Act at least, no special exclusion is allocated towards prior negotiations or subsequent

¹³² *Investors Compensation* (n 1) 913 (Lord Hoffmann).

¹³³ (1878) 3 App Cas 552 (HL).

conduct: both may be admissible to interpret the contract provided that they do not infringe the rules pertaining to latent or patent ambiguities. However, the courts applying the Indian Evidence Act still adopt the common law exclusionary rule against both types of extrinsic evidence, regardless of whether the contractual language is ambiguous or not.¹³⁴

This may require reconsideration as being a matter not contemplated by the Indian Evidence Act. In this regard, it is important that the Indian Evidence Act has provided for the instances where extrinsic evidence (which can include prior negotiations) may (or may not) be admitted for the interpretation of a contract in sections 94 to 100 on a particular basis. A common law development that justifies exclusion of prior negotiations on a different basis would be inconsistent. This argument is strengthened when one considers that prior negotiations were not treated apart from other types of evidence at the time the Evidence Act was enacted. Indeed, prior negotiations were in fact admissible to ascertain the aim and object of the contract as early as in 1835. In *Reay v Richardson*,¹³⁵ a previous conversation was held admissible to explain the motive that induced the plaintiff to enter into a compromise agreement with the defendant. Parke B held that the evidence of the conversation was not to add to or qualify the terms of the agreement, but to show with what view the agreement was written.¹³⁶ Prior negotiations were only excluded on the principle that 'it is not permitted to interpret what has no need of interpretation'.¹³⁷ This rested upon the belief that words have fixed meanings, such that a party who has used clear and unambiguous language will be held to all that naturally follows from a direct and plain understanding of such language.¹³⁸ It was only when a term was susceptible to several meanings¹³⁹ that recourse could be had to the relevant context in order to discover the parties' true intentions.¹⁴⁰ The criterion, it bears repeating, used to be that of 'ambiguity' to determine whether extrinsic evidence of any kind can be admitted to interpret contracts. Since the Indian Evidence Act¹⁴¹ was intended to codify the English evidence law at that time,¹⁴² it is likely that Stephen, the draftsman, intended to import these common law principles into the Act. If so, the recognition of the exclusionary rule, based as it is on a different rationale for excluding prior negotiations, would be inconsistent with the Indian Evidence Act and must be rejected pursuant to section 2(2) of the same Act. This is because the

¹³⁴ Eg, *Belapur* (n 29) [23]; *Zurich Insurance* (n 41) [132].

¹³⁵ (1835) 2 C M & R 421; 150 ER 182.

¹³⁶ (1835) 2 C M & R 421, 426; 150 ER 182, 184.

¹³⁷ H T Colebrooke, *Treatise on Obligations and Contracts* (Black, Kingsbury, Parbury, and Allen, Leadenhall-Street 1818) 66.

¹³⁸ *ibid*; Joseph Chitty, *A Practical Treatise on the Law of Contracts Not Under Seal and upon the Usual Defences of Actions thereon* (Sweet Chancery Lane 1826) 20, citing 5 Vin Ab 510, 4 East 136.

¹³⁹ *Smith v Jeffries* (1846) 15 M. & W. 561, 562; 153 ER 972, 972–973.

¹⁴⁰ Colebrooke (n 137) 67.

¹⁴¹ More specifically, the Indian Evidence Act: see Heydon, (n 2) 1–2.

¹⁴² See Stephen (n 17) 2.

exclusionary rule is inconsistent with the rationale of the Indian Evidence Act, which provides for when extrinsic evidence may be admissible based on the criterion of ‘ambiguity’. While the Act may be non-exhaustive, the very idea of separating prior negotiations as a species of evidence to be treated differently is inconsistent with the central criterion of ‘ambiguity’ that governs admissibility for all extrinsic evidence. This is not a situation involving the common law filling in a lacuna in the Indian Evidence Act; rather, the Indian Evidence Act has provided an approach that the exclusionary rule is inconsistent with. Therefore, it is submitted that, on this basis alone and pursuant to section 2(2) of the Indian Evidence Act, the exclusionary rule should not be adopted in jurisdictions with the Indian Evidence Act.

4 Isolating Areas of Compatibility

From the above analysis, it is clear that both the Indian Evidence Act and the modern contextual approach share a concern for context. That is a significant starting point which, however, gives rise to various differences. First, the degree to which they are so concerned is different. The admissible background information for the purpose of explaining the contractual language in the Indian Evidence Act, centred on the criterion of ‘ambiguity’, is narrower than the modern contextual approach, with the result that the ‘context’ for the purposes of the Indian Evidence Act is potentially narrower. The admissibility criterion for interpreting words under the Indian Evidence Act is that of ambiguity, although extrinsic evidence is admissible to establish ambiguity. In contrast, the modern contextual approach has no such narrow limitation. Nonetheless, ‘ambiguity’ is a flexible concept, and has been so interpreted by modern Commonwealth courts. The reality is that Commonwealth courts have been all too willing to admit extrinsic evidence, and are very ready to find the requisite ‘ambiguity’ before evidence can be admitted. Thus analysed, the compatibility between the Indian Evidence Act and the modern contextual approach may thus not be all too stark.

E THE WAY FORWARD

1 Is There a Problem with Retaining the Status Quo?

In assessing the way forward, one question that might be asked is whether there is any problem with retaining the approach taken in the Indian Evidence Act. While many courts in jurisdictions governed by the Indian Evidence Act have adopted the modern contextual approach, one might perhaps ask if adherence to the Evidence Act is indeed inferior to pushing on toward the adoption of the modern contextual approach.

(a) Advantage of the Modern Contextual Approach?

One apparent advantage of the modern contextual approach is that it dismisses the distinction between patent and latent ambiguities, which has been largely discredited. This affords the courts more flexibility in admitting extrinsic evidence to interpret the contract,¹⁴³ rather than allowing extrinsic evidence freely only when establishing whether there is an ambiguity in the first place. However, according to one commentator,¹⁴⁴ the modern contextual approach has seen a retreat of late following the decision of the UK Supreme Court in *Rainy Sky v Kookmin Bank*.¹⁴⁵ Lord Clarke in that case had stated that ‘[w]here the parties have used unambiguous language, the court must apply it’.¹⁴⁶ This seems to impose a criterion of ambiguity before the plain meaning of the contractual words can be departed from. Taken a step further, this may also restrict the range of admissible evidence to interpret the contract unless there is ambiguity. If this reading of *Rainy Sky* is correct, there is not much difference between the prevailing modern contextual approach and the Indian Evidence Act. There may therefore not be as strong an advantage in the modern contextual approach over the Indian Evidence Act.

(b) Advantage of the Indian Evidence Act

In fact, an advantage of the Indian Evidence Act is that it provides a principled basis for distinguishing classes of evidence, principally prior negotiations and subsequent conduct. One might disagree with the use of ambiguity as a criterion, but that is at least a basis. This is in contrast with the modern contextual approach that differentiates prior negotiations and subsequent conduct on questionable and unclear justifications, and excludes them from consideration. As has been pointed out,¹⁴⁷ the Indian Evidence Act does not differentiate between prior negotiations, subsequent conduct and other forms of extrinsic evidence. This is mainly historical: the criterion governing admissibility was the presence of latent ambiguity, and prior negotiations were only excluded if there was no latent ambiguity. Putting aside the idea of latent ambiguity, this approach has much to commend about it. There is in reality no fundamental distinction between prior negotiations and other types of extrinsic evidence such as to justify a substantive rule barring the admission of prior negotiations exclusively. It is little wonder that the boundaries of the supposed exclusionary rule against prior negotiations have been acknowledged to be unclear by the highest authorities.¹⁴⁸

¹⁴³ Cf A Berg, ‘Thrashing Through the Undergrowth’ (2006) 122 Law Quarterly Review 354.

¹⁴⁴ Paul Davies, ‘Interpreting Commercial Contracts: A Case of Ambiguity?’ [2012] Lloyd’s Maritime and Commercial Law Quarterly 26, 27.

¹⁴⁵ [2011] UKSC 50.

¹⁴⁶ *ibid* [23] (Clarke SCJ).

¹⁴⁷ *Rajah* (n 6) [19].

¹⁴⁸ *Investors Compensation* (n 1) 913 (Lord Hoffmann).

2 Limited Reform Needed

Compared thus, it is suggested that the Indian Evidence Act is actually closer to the modern contextual approach than one might think. The main difference is the criterion of ambiguity, which restricts the extrinsic evidence admissible for the specific purpose of interpretation, but even that may be narrowing. Thus, the integrated approach used by the Singapore Court of Appeal, subject to one caveat, may actually be the best way of balancing the concerns of history (within the Indian Evidence Act) and the requirements of the modern commercial reality. One way out is simply to read the ambiguity provisions widely; while the idea of ambiguity is embedded within the Indian Evidence Act and should be respected, the degree of ambiguity is not and should remain a flexible concept even a century after the passage of the Act. Indeed, the degree of ambiguity required is not specified in the Act. This is similar to the approach in Australia following *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*,¹⁴⁹ in which Mason J required the identification of ambiguity before extrinsic evidence could be taken into account in interpreting a contract. However, subsequent courts have been ‘generally quite generous’¹⁵⁰ in finding that the words of a contract ‘are ambiguous or susceptible of more than one meaning’. This therefore allows for the easier admission of extrinsic evidence to interpret the contract.

Thus, a flexible reading of ambiguity—perhaps requiring a lesser degree of such—may actually afford the courts a lower threshold to cross before being able to depart from the plain meaning of the contractual words concerned. Such an approach, if adopted, effectively means that the Indian Evidence Act jurisdictions can first consider extrinsic evidence in determining if there is ambiguity, and then depart from the plain meaning of the words with just a slight hint of ambiguity (where application of the plain meaning gives rise to such ambiguity). This ensures that the courts will not be unduly bound to the so-called plain meaning of the words devoid of their proper context. It bears repeating that such an approach is not founded on a ‘liberal’ reading of the Indian Evidence Act. To the contrary, such an approach accords with the original legislative intent behind the Act and yet also (as a coincidental point) affords some (but not total) adherence to the modern contextual approach.

Nonetheless, if reform is needed, it is submitted that any reform cannot be premised on a ‘liberal’ interpretation of the Indian Evidence Act. There is no real

¹⁴⁹ (1982) 149 CLR 337 (Aust HC) 401. Writing extra-judicially, Mason J said that while the clear words of a contract should not be displaced by extrinsic evidence, ambiguity may ‘not be a sufficient gateway’ for the admission of extrinsic evidence, and that the gateway ‘should be wide enough to admit extrinsic evidence which is capable of influencing the meaning of the words of the contract’: A Mason, ‘Opening Address’ (2009) 25 *Journal of Contract Law* 1, 3.

¹⁵⁰ Sir Kim Lewison and David Hughes, *The Interpretation of Contracts in Australia* (Lawbook Co 2012) 113. It should also be noted that the Australian courts may be departing from the position adopted in *Codelfa*, *ibid* 114.

distinction between a 'liberal' and an 'illiberal' interpretation; the only question, according to the theory of statutory interpretation prevalent in the Commonwealth, is whether an interpretation furthers the intention of Parliament, which in turn is generally regarded as having been preserved at the time of enactment of the Act concerned. A 'liberal' interpretation of the Indian Evidence Act runs the risk of judicially interpreting the law to mean what Parliament never intended to do (and still has not done). By its very nature, and taking into account its historical origins, the Indian Evidence Act is incapable of sustaining the entire modern contextual approach. The result is that jurisdictions governed by that Act cannot import the entire modern approach. Any legislative reform should amend the Indian Evidence Act to delete the specific provisions concerning latent and patent ambiguity. And, further, what is really required here is that proviso 6 to the 'exclusion of oral evidence' provision be elevated to an independent provision of its own, thereby providing clear legislative intent that the contextual approach is to apply, and that ambiguity does not dictate whether the plain meaning of words can be departed from. Having said that, however, it bears repeating that the position taken in this article is that the Singapore approach is an adequate balance of fidelity to the history of the Indian Evidence Act and the advances of the modern contextual approach. Perhaps the drastic recourse to statutory reform can be put aside for now.

F CONCLUSION

In conclusion, the modern contextual approach is not completely incompatible with the Indian Evidence Act. Both approaches, at least following one reading of the Supreme Court decision of *Rainy Sky*, seemingly adopt a starting point that words have plain or fixed meanings and, significantly, neither deems this as an irrebuttable position. The plain meaning can be departed from where its application results in an ambiguity. Both approaches also allow for the admission of extrinsic evidence to establish the context, although the Indian Evidence Act does so on a more restricted basis compared with the modern contextual approach. It is this more restrictive basis that differentiates the two approaches. However, it would be wrong to think that the Indian Evidence Act does not freely admit extrinsic evidence; it does, but only for the specific purpose of ascertaining whether there is ambiguity, which is required before further evidence may be admitted to interpret the contractual word in a positive fashion. While this may rightly be regarded as a shortcoming of the Indian Evidence Act, it is submitted that the integrated approach from Singapore may be a good balance before statutory reform can be envisaged. Such an approach, while commercially pragmatic, is also (to a large extent) theoretically and doctrinally sound. It should be pursued over the full (though historical) adherence to the Indian Evidence Act, as well as full rejection of the same.